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No. 887

Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under Section 1(18) of the Interstate Commerce Act, a railroad must obtain from the Interstate Commerce Commission a certificate of public convenience and necessity in order to serve one shipper over tracks owned and maintained by that shipper.

STATEMENT

Respondent is an interstate common carrier by rail. One of its lines of track is in Indiana, running, so far as relevant here, from Evansville to Huntingburg by

way of Boonville. Near Boonville a spur track about a mile and a half long takes off from respondent's main line of tracks, running north. Connecting with respondent's spur track is a private track about ten miles long owned by the Peabody Coal Company and running to that company's Lynnville mine.[1] Except for a little less than a mile of track nearest to the mine this track was built between 1945 and 1954. (Pet. App. 3). The various sections were built by or for Peabody or a predecessor in interest. Peabody owns the land on which the track is located or has appropriate easements. (*Ibid.*) As for the last 5,150 feet of track, Peabody itself did the subgrading and spread ties on 2,150 feet, and a construction company working for Peabody subgraded the remaining 3,000 feet in 1955; at Peabody's request respondent completed the construction of the track in 1958, for which it was paid, after negotiations over the mode and terms of payment, in 1963. (*Id.* at 3-4). At the time of the trial in this case the entire ten miles of track was owned and maintained by Peabody.

Respondent began serving the Lynnville mine over the spur and the ten miles of Peabody's privately-owned track in 1959. It does not use the track for any other purpose. (*Id.* at 4). Its tariffs cover only the movement of coal from Boonville, on its line, to the point of destination.

The Lynnville mine is close to a branch line of the petitioner, also a common carrier by rail, that was constructed in the late 1930's in order to serve the mine field in which the Lynnville mine is located. A sub-

[1] The sketch at Pet. 3 provides an adequate orientation to the geography of the case.

stantial amount of coal is shipped from this mine on petitioner's railroad. (*Id.* at 2-3).

On October 4, 1962, petitioner brought suit in the District Court for the Northern District of Illinois under Section 1(20) of the Interstate Commerce Act, seeking an injunction that would prevent respondent from serving the Lynnville mine. Section 1(20) provides that at the suit of the United States, the Interstate Commerce Commission, a state regulatory commission or any party in interest a court may enjoin construction or operation of a line of railroad that is in violation of Section 1(18) of the Act. Section 1(18) provides that no railroad subject to the Act "shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad," without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. Section 1(22) excepts from the certificate requirement construction of spur, industrial, team, switching or side tracks located wholly within one state. Neither the United States, the Interstate Commerce Commission nor any state body joined in petitioner's suit.

After trial the district court dismissed petitioner's complaint. The court reviewed at length relevant opinions of this Court, the lower federal courts and the Commission construing Section 1(18) and related sections of the Act. (Pet. App. 4-21). It concluded that where it operates over a private track owned by a shipper a carrier does not undertake an activity covered by Section 1(18) unless (1) it maintains a

common carrier service, *i.e.*, serves the public generally, over such track or (2) it pays for the use or maintenance of the track. The court found that the track in issue was owned and maintained by Peabody, including the last nine-tenths of a mile which respondent helped build. Petitioner had emphasized respondent's part in the construction of this length of track. The court found that Peabody had requested that respondent build the track, had paid for the track and had title both to the track and the right-of-way over which it runs. (*Id.* at 22). "The building of this segment was private construction by Peabody, the same as if Peabody had contracted with any other builder for the job." (*Ibid.*) The court found that respondent did not hold itself out as carrying on a common carrier operation from the Lynnville mine over Peabody's private track. (*Id.* at 25). Finally, it was found that respondent did not pay Peabody for operating over the track and had no trackage rights. (*Id.* at 22). On this analysis the operation of respondent over the Lynnville mine tracks was simply not an extension of respondent's line or otherwise covered by Section 1(18), and so the question whether the tracks were within one of the exceptions provided by Section 1(22) was not reached (*id.* at 18-19).

The Court of Appeals for the Seventh Circuit agreed with the district court's legal analysis and determined, upon an examination of the record, that its factual findings were properly supported. It therefore affirmed the judgment on the district court's opinion. (*Id.* at 28-29).

REASONS FOR DENYING THE WRIT

The decision below is an application to the unique facts in issue of the terms of Section 1(18) of the Interstate Commerce Act as they have been construed by this Court since soon after that paragraph was added to basic transportation law by the Transportation Act of 1920. There is no conflict with decisions of other courts of appeals. What petitioner really seeks is further review by this Court of fact findings made by a district court and sustained by a court of appeals. The case, therefore, is plainly not within the criteria governing the exercise of this Court's discretionary jurisdiction on certiorari.

On the facts found by the district court this case is controlled by the decision of this Court in *Cleveland, C., C. & St.L. Ry.* v. *United States,* 275 U.S. 404 (1928). That case arose under Section 1(9) of the Interstate Commerce Act, which empowers the ICC, under certain conditions, to require a railroad to provide a switching connection with a shipper's private line. The Commission entered an order requiring a railroad to make a switching connection with a three-and-a-half mile track a shipper had built from a mine located on another railroad. In this Court the railroad that had been ordered to make the connection argued that the power of the Commission under Section 1(9) had been abrogated by the subsequently enacted Section 1(22) and that in any event an order of the Commission under Section 1(9) must comply with the requirements of Sections 1(18) through (21). In response to these contentions this Court held that the paragraphs of Section 1 that were invoked there and that govern here "deal primarily with rights sought to be exercised by the carrier," 275 U.S. at 408, and that they "deal with

construction . . . on the part of the carrier, not with side tracks built by the shipper," 275 U.S. at 409.

> "The mere fact that a side track with which a connection is sought extends to an industry located on another railroad does not make the switch connection or the track of the shipper, or both combined, an extension of the railroad within the meaning of paragraphs 18 to 21." *Ibid.*

That, of course, is what Section 1(18) says. Its strictures run against a "carrier by railroad" undertaking "the extension of its line of railroad, or the construction of a new line of railroad," or acquiring or operating "any line of railroad, or extension thereof," or engaging in common carrier transportation "over or by means of such additional or extended line of railroad . . . ." It does not extend to shipper's tracks that are used only to serve that shipper.

Thus, only by an examination into the district court's findings of fact as to the status of the track in question and a conclusion that such findings were clearly erroneous can the rule of the *Cleveland* case be avoided here. This Court does not sit to review ordinary findings of fact, especially findings reviewed already by a court of appeals and found to be properly supported. In any case, the findings of the district court are amply supported. The evidence established, as the district court found, that Peabody and the respondent contemplated from the beginning that respondent would be its contractor in the construction of not quite a mile of track, that there were negotiations over price and other terms during and subsequent to the construction and that eventually Peabody paid "a sum far too high to demonstrate that this was a sham transaction." (Pet. App. 22-23). Indeed, petitioner's

only significant argument on this score is that the amount finally paid by Peabody was slightly less than the cost to respondent of the construction. But, as the district court found, "the price that Peabody was willing to pay could have reflected any number of considerations unrelated to the initial cost to" respondent, and the fact that respondent "could not drive a better bargain cannot be held, I think, to make its loss an expenditure for track amounting to an extension of line." (*Id.* at 24).

Petitioner suggests only one way in which the *Cleveland* case can be distinguished from this one. There it appears that the shipper was to deliver empty cars and receive loaded cars at the switching connection. (Pet. 12). Here respondent physically moves coal cars along the private track to the connection with its track. We are not informed, however, how this distinction is legally significant under the terms of Section 1(18). Indeed, petitioner never does come to grips with the language of the statute. Its appeal, even in its statement of the question presented, is to "the public policy of the statute." In fact, the distinction that petitioner draws has no legal significance. Respondent's use of the shipper's track to serve the shipper, which is customary in serving coal mines, does not make the shipper's track an extension of respondent's "line of railroad." It does not mean that a "line of railroad" owned and maintained by the shipper over which respondent has no trackage rights has been acquired or is operated by respondent. And, since the district court found that respondent does not hold itself out as a common carrier to and from Lynnville, respondent is within the established rule that "service over private tracks or plant-facility track

by a common carrier subject to our jurisdiction is neither compelled nor prohibited under the Interstate Commerce Act, and to furnish or withhold it is the discretion of the carrier." *United States* v. *Aberdeen & R.R.R.*, 289 I.C.C. 49, 65 (1953), *aff'd sub nom. United States* v. *ICC*, 352 U.S. 158 (1956); see also *Rex Jellico Coal Co.* v. *Louisville & N.R.R.*, 237 I.C.C. 67, 70-71 (1940); *Winnsboro Granite Corp.* v. *Southern Ry.*, 176 I.C.C. 481, 483 (1931).[2]

The district court did not need to reach the question most frequently litigated in borderline cases arising under Section 1(18) and related provisions of the Act. That question is whether a particular extension is within the exception provided by paragraph (22) for "spur, industrial, team, switching or side tracks . . . ."

The foundation decision to which courts turn in attempting to resolve the typical Section 1(18) question is, of course, *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926). This is the case principally relied upon by petitioner here. It dealt with a line of tracks by which a carrier intended to reach "on its own rails" six plants served by another carrier. 270 U.S. at 275. In its opinion this Court held that the context and the policy of the Transportation Act of 1920, which introduced Sections 1(18) through (22) into the Interstate Commerce Act, provided the proper

[2] The carrier's freedom is subject to the prohibition in § 3 of the Act against undue preference or prejudice; if service over its track is rendered to one shipper, it may have to be rendered to competing shippers similarly situated. Acting pursuant to § 3, the Commission, some years after this Court's *Cleveland* opinion, ordered the railroad there involved to serve the shipper there involved over its track, without, of course, issuing any certificate of public convenience and necessity. J. K. Dering Coal Co. v. Cleveland, C., C. & St.L. Ry., 206 I.C.C. 661 (1935).

guide to definition of the terms used in paragraph (22). The policy, as it found expression in paragraphs (18) and (22), was that the building of unnecessary lines involves a waste of carrier resources, the burden of which may fall upon the public, and that competition between carriers may result in harm to the public as well as in benefit. 270 U.S. at 277-78. Thus, the question in the typical case is not whether a particular line of track or proposed line of track is in technical railroad parlance a spur or industrial or team or switching or side track. The question rather is whether such a line of track, owned or to be built by the carrier, extends the carrier into new territory, particularly territory served by another carrier, so that the ICC should determine whether nevertheless its construction would serve the public convenience and necessity. That was the question posed in the cases listed by petitioner (Pet. App. 36-37); all involved carrier-owned tracks.

But there is no such question when, at the threshold, it is determined the line of track is a private track, not an extension of a carrier's system or operated by it or used by it in common carriage. That is established by the *Cleveland* opinion, which was written by Mr. Justice Brandeis, author of the *Texas & Pacific* opinion as well and the authoritative expositor for this Court of the meaning of the Transportation Act of 1920. In the *Cleveland* case he took note of his earlier opinion and made quite clear that it did not govern where a shipper's tracks are involved. 275 U.S. at 409.

Petitioner wholly misconceives the ground of decision below when it says—to take one statement of a theme that recurs in the petition—that "the opinion below does not hold that Southern's operation comes

within the exceptions in paragraph 22, but rather holds that the expenditure of carrier funds for track is a 'crucial consideration' which, if not satisfied, prevents operation of paragraph 18 and prevents consideration of carrier competition as related to the second and equally important purpose of the statute. . . ." (Pet. 8-9; see also *id.* at 7, 10, 11, 12). The point of the decision below was not that the prevention of dissipation of carrier resources through wasteful expenditures for track construction is the overriding policy of Section 1(18). It was that there must be an extension or an operation of a railroad line *by the carrier* before 1(18) comes into play at all, and the fact that there has been no outlay of money by the carrier is certainly some evidence that a line of railroad is not its line of railroad.

To be sure, there might some time be a case in which some of the fears expressed by petitioner in its petition were real ones. The district court recognized this when it explicitly found that this was not "a sham transaction." (Pet. App. 23). Through a sham arrangement with a shipper a carrier could effectively extend its line and thereby dissipate its resources and invade the territory of another carrier. In such a case presumably formalities of ownership would not be allowed to stand in the way of effectuating the policy of Section 1(18). On the facts found, this is simply not that case.

CONCLUSION

The petition for writ of certiorari should be denied.

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